Nos. 04-1244, 04-1352

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In the

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF ALABAMA, COLORADO, DELAWARE, KANSAS, MICHIGAN, OHIO, SOUTH DAKOTA, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Troy King
Attorney General
Kevin C. Newsom
Solicitor General
Counsel of Record
STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7401

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(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL

JOHN W. SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
7th Floor
Denver, CO 80203

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
Department of Justice
820 N. French Street
Wilmington, DE 19801

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Avenue
Topeka, KS 66612-1597

MICHAEL A. COX
ATTORNEY GENERAL
STATE OF MICHIGAN
P.O. Box 30212
Lansing, MI 48909

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad Street
Columbus, OH 43215-3428

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
500 East Capitol Avenue
Pierre, SD 57501

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
Utah State Office Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320

QUESTIONS PRESENTED

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Hobbs Act, 18 U.S.C. § 1951(a), punishes acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether injunctive relief is available in a private civil action for treble damages brought under RICO, 18 U.S.C. § 1964(c).*

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* These questions are taken verbatim from petitioners' brief in *Scheidler v. National Organization for Women, Inc.*, No. 04-1244.

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INTEREST OF AMICI

Traditionally, courts have read the federal Hobbs Act to permit criminal prosecution (or civil liability) only in cases involving either robbery or extortion. In the decision below, the Seventh Circuit broke ranks and held that, in addition to those two discrete crimes, the Hobbs Act can be construed to punish *any* act or threat of physical violence to *any* person or property that in *any* way affects interstate commerce. The States' interests in this case are two-fold. First, the States have a compelling interest in resisting the federalization of the criminal law, an area "where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). Second, the States have a keen interest in ensuring that their officers and employees, who necessarily engage in acts and threats of physical violence to persons (as in day-to-day police work) and property (as when condemning blighted buildings) are protected against over-expansive constructions of the Hobbs Act and its fellow traveler, RICO.

STATEMENT

In briefing this case several years ago, the State of Alabama argued that, by essentially ignoring the requirement that property be "obtain[ed]" to trigger Hobbs Act liability for extortion, the Seventh Circuit had expanded the Hobbs Act's (and, by extension, RICO's) scope in a way that was "truly breathtaking – and troubling." Br. for the State of Alabama as Amicus Curiae at 10, *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003) (Nos. 01-1118, 01-1119) (cert. stage). By an 8-1 margin, this Court agreed and held that it is not enough for Hobbs Act purposes that an individual be induced "'to give up' property rights"; rather, a party liable for extortion under that Act must not only deprive his victim of her property but also acquire – in the words of the statute, "obtain[]" – that property for himself. *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 400-09

(2003) (hereinafter "*Scheidler II*"[1]). Any other reading, this Court said, would constitute an "unwarranted expansion" of the Hobbs Act's definition of extortion. *Id.* at 402.

Then, on remand from this Court's reversal, in the decision now under review, the Seventh Circuit opened up another, more problematic can of worms. The court of appeals suggested (contrary to existing understanding) that robbery and extortion are *not* the only two offenses that can give rise to Hobbs Act liability. There is, the Seventh Circuit said, a third "way." Pet. App. 8a.[2] Specifically, that court held that it may well be enough for a Hobbs Act prosecutor (or plaintiff) to show – without reference to any robbery or extortion – that another person has "commit[ted] or threaten[ed] physical violence to any person or property" in a way that somehow "obstruct[s], delay[s], or affect[s] commerce." Pet. App. 26a-29a (panel); Pet. App. 6a-15a (rehearing). Thus, the Seventh Circuit left open to the district court the question whether four claimed "acts or threats of physical violence" – acts freestanding in the sense that they bear no relation to any alleged robbery or extortion – could alone support Hobbs Act (and RICO) liability. *See* Pet. App. 27a-28a.

The Seventh Circuit's construction of the Hobbs Act this go around is even more "breathtaking" and "troubling" than before. Last time, at least, the court of appeals' expansion of the Hobbs Act was limited to the term "extortion"; a deprivation of property, that court said – even without an accompanying acquisition – was sufficient to constitute Hobbs Act extortion. (Again, we disagreed, as did this Court.) This time, it seems to us, the stakes are much higher. This time, the Seventh Circuit is not just tweaking or massaging an *existing* basis for Hobbs Act liability –

[1] "*Scheidler I*" being *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

[2] All "Pet. App." references are to the appendix submitted with the petition in *Scheidler v. National Organization for Women, Inc.*, No. 04-1244.

"extortion" means this, or "robbery" means that. This time, the Seventh Circuit has opened up an *entirely new* avenue – a third "way," to use that court's terminology – to Hobbs Act liability. The Seventh Circuit's decision here leaves open the possibility that neither extortion nor robbery is a necessary ingredient of a Hobbs Act violation, at all – that it is enough for a person simply to commit or threaten violence (either to another person or to property) in any way that affects interstate commerce.

That overbroad reading of the Hobbs Act, we respectfully submit, is simply not defensible by reference to any traditional tool of statutory interpretation.

SUMMARY OF ARGUMENT

The court of appeals' "three-way" reading of the Hobbs Act is irreconcilable with the Act's text and legislative history, with the structure of the federal criminal code, and with fundamental principles of federalism. It should be rejected.

1. The Hobbs Act is straightforwardly and sensibly read to embody (1) a core prohibition on robbery and extortion and (2) complementary prohibitions on (a) attempts and conspiracies to rob or extort and, more importantly here, (b) acts and threats of physical violence associated with robberies and extortion. The three-way interpretation, by contrast, requires either mangled transitions, grammatical circularity, or both.

2. The Hobbs Act's legislative history likewise supports the traditional understanding and condemns the three-way reading. Both the Anti-Racketeering Act (the predecessor of the Hobbs Act) and the Hobbs Act itself as originally enacted demonstrate that in order to be actionable an act or threat of physical violence must accompany robbery or extortion. As the Seventh Circuit itself acknowledged, there is absolutely no indication that Congress intended to usher

in any substantive change in the law when it restructured the Hobbs Act in 1948.

3. The three-way interpretation of the Hobbs Act would also wreak havoc with the federal criminal code. By making any act or threat of physical violence – standing alone – a federal offense, the three-way reading would render essentially superfluous a whole host of other, more specific, federal criminal statutes – among them, the FACE Act, which deals expressly with the issue of clinic violence, as well as provisions criminalizing assault, arson, kidnapping, hostage-taking, carjacking, and sexual abuse. At the same time, the three-way interpretation would dramatically expand RICO's reach, inasmuch as crimes (like assault) that are not listed as RICO predicate offenses could be dressed up as violations of the Hobbs Act (which is listed) and charged as predicates nonetheless.

4. Perhaps most fundamentally, the three-way reading contravenes the most basic tenets of Our Federalism. First, whether or not the three-way interpretation would actually render the Hobbs Act unconstitutional, it would serve to federalize essentially all violent crime, a subject over which the States have traditionally exercised sovereign control. Under *Gregory v. Ashcroft*, 501 U.S. 451 (1991), and subsequent cases applying its clear-statement principle, this Court should be slow to attribute to Congress such a sweeping redistribution of power. Second, the three-way reading actually does pose significant Commerce Clause (and, as it turns out, Domestic Violence Clause) questions. The Hobbs Act should be read to avoid those questions, not to invite them.

ARGUMENT

The Hobbs Act Cannot Reasonably Be Read To Reach Freestanding Acts or Threats of Physical Violence, Unconnected to Either Robbery or Extortion.[3]

In relevant part, the Hobbs Act provides as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a).

The Seventh Circuit posited "two possible interpretations of this language." Pet. App. 8a. "'First it may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion." *Id.* (quoting Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129, 142-43 (1994)). Alternatively, the court of appeals said, it might instead "'forbid[] threatening or committing physical violence in furtherance of a plan to "obstruct, delay, or affect commerce" (other than through robbery or extortion).'" *Id.* (quoting Bradley, *supra*, at 143). In other words, the Seventh Circuit summarized, the Hobbs Act lends itself to both a "two-way" interpretation – the two prohibited acts being robbery and extortion – and a "three-way" interpretation – under which, in addition to robbery and extortion, "physical violence" alone can support a Hobbs Act claim. *See id.* The Seventh Circuit explicitly held open – and seemed at least

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[3] Amici address here only the second Question Presented, which pertains to the proper interpretation of the Hobbs Act.

implicitly to endorse – the broader, three-way interpretation. *See* Br. for the States of Alabama *et al.* at 5-6 (cert. stage).

The Sixth and Ninth Circuits, by contrast, have definitively rejected the so-called three-way reading. The Sixth Circuit, for its part, said that it could not "accept the government's view that the statute proscribes all physical violence obstructing, delaying, or affecting commerce"; rather, that court held, §1951(a)'s "language and legislative history require that the violence be in furtherance of a plan or purpose to obstruct, delay, or affect commerce *by extortion or robbery*." *United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975) (emphasis added). The Ninth Circuit was even less charitable: It described as "untenable" and "fatally flawed" the Government's view that "the Hobbs Act criminalizes any act of violence to person or property that has an effect on commerce, even if the alleged violent act had no connection to any executed or planned robbery or extortion." *United States v. Yankowski*, 184 F.3d 1071, 1072, 1073 (9th Cir. 1999).

This Court granted certiorari, in part, to clarify the Hobbs Act's proper construction. Amici respectfully submit that the so-called three-way interpretation of the Hobbs Act is indeed, as the Ninth Circuit has said, "untenable" and "fatally flawed." The Act's text and legislative history, statutory structure, and fundamental principles of federalism combine to condemn the freewheeling three-way reading that the Seventh Circuit's decision so struggles to preserve.

I. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Text.

First, there is the Hobbs Act's plain language. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 172 (2001) ("Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute."). Because a careful textual analysis is in order here, we set out that language again:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a).

The Seventh Circuit believed that "[g]rammatically, the text can be read either way" – that is, to support either the two-way or the three-way interpretation – "without undue strain." Pet. App. 8a. We disagree. As a matter of grammar, the three-way interpretation of §1951(a) seems to us quite "strain[ed]." Reading the Act to make physical violence a stand-alone violation is worse than awkward: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce ... commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section ...." The transition between the preambular clause about "commerce" and the phrase "commits or threatens physical violence" just doesn't work. And, it should be noted, the difficulty cannot be alleviated by keeping the word "or" with the phrase "commits or threatens physical violence." While that might solve grammatical problems (allowing for a workable transition), it would have the effect, as well, of making the act of "obstruct[ing], delay[ing], or affect[ing] commerce" *itself* a stand-alone Hobbs Act offense – an interpretation that, to our knowledge, no one has endorsed.

The Seventh Circuit's three-way reading suffers from an additional textual flaw. The Hobbs Act's physical-violence clause applies only to one who "commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section*." 18

U.S.C. §1951(a) (emphasis added). The italicized language seems quite clearly to refer back to something that has come before - something that constitutes the relevant "violation of this section." If, as the Seventh Circuit's opinion suggests, an act or threat of physical violence may *itself* constitute the relevant "violation of this section," then the physical-violence clause would be read to apply to anyone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to *commit or threaten physical violence to any person or property*." That circular formulation, of course, doesn't make any sense.

Far and away the best reading of the Hobbs Act goes like this: At its core, the Act applies to any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, *by robbery or extortion*." 18 U.S.C. §1951(a) (emphasis added). The two clauses that follow both refer back to that core prohibition. First, the Act targets anyone who "attempts or conspires *so to do*" - that is, attempts or conspires to obstruct, delay, or affect commerce by robbery or extortion. *Id.* (emphasis added). Second, and more immediately relevant here, the Act reaches anyone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of this section*" - that is, commits or threatens violence in furtherance of a plan to obstruct, delay, or affect commerce by robbery or extortion. *Id.* (emphasis added). Under this sensible and straightforward reading, §1951(a) entails (1) a core prohibition on robbery and extortion and (2) complementary prohibitions on (a) attempts and conspiracies to rob or extort and (b) acts or threats of violence associated with robberies and extortion.

II. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Legislative History.

Not surprisingly, the Hobbs Act's legislative history leads to precisely the same conclusion. Indeed, two separate

pieces of legislative history expose the error of the three-way interpretation. First, there is the Anti-Racketeering Act of 1934, which this Court has called the "predecessor to the Hobbs Act." *United States v. Culbert*, 435 U.S. 371, 375 n.5 (1978). The Anti-Racketeering Act, as summarized by the Ninth Circuit in *Yankowski* (and as acknowledged by the Seventh Circuit here, *see* Pet. App. 11a-12a), provided that "[a]ny person who, in connection with or in any degree affecting trade or commerce (a) commits or attempts extortion of money, or (b) obtains property through extortion, or (c) *'commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b),'* or (d) conspires with respect to (a), (b) or (c) ... shall be imprisoned or fined." 184 F.3d at 1073 n.5 (quoting Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979) (emphasis added). That, at least as far as extortion is concerned, is very nearly exactly the prohibition expressed by the plain language of the present-day Hobbs Act: Physical violence is not itself the object of the statute - extortion is - but only one means of accomplishing that object. Petitioners specifically brought the Anti-Racketeering Act to the Seventh Circuit's attention in their petition for rehearing[4]; conspicuously, however, the Seventh Circuit had nothing to say about either the Anti-Racketeering Act or what it might spell for the three-way interpretation.

Second, there is the language of the Hobbs Act as originally enacted in 1946. The "fit" between the original Act (which we quote at length below) and the plain-language reading of the current version is remarkable:

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any

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[4] *See* Pet. for Rehearing and En Banc Rehearing of Defendants-Appellants Joseph Scheidler *et al.* at 10-11, *National Org. for Women, Inc. v. Scheidler*, Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050 (Mar. 10, 2004).

article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946). The conclusion is unmistakable: The core prohibition (in the 1946 Act, Section 2) targets "robbery [and] extortion"; the complementary prohibitions against conspiracies (Section 3), attempts (Section 4), and physical violence (Section 5) do not stand alone but, rather, all refer back to the core prohibition. All of which, we submit, dovetails precisely with the best reading of the Hobbs Act as currently structured.

The Seventh Circuit acknowledged that, as enacted in 1946, the Hobbs Act "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." Pet. App. 15a. But, the court said, it was not until 1948 that the Act "assumed its present form." *Id.* And while conceding that the 1948 revisions "were intended to be formal, stylistic changes," the Seventh Circuit supposed that it was "not beyond the realm of possibility that the revisers may have made certain substantive changes either advertently or inadvertently." *Id.* There are three fundamental problems with the court of appeals' reasoning in this respect, which we will mention briefly. First, if, as the Seventh Circuit admits, the 1948 changes were "intended" to be only formal and stylistic, then, by definition, any

substantive changes could not have been "advertent," but must have been accidental, instead. *See, e.g., 7 Oxford English Dictionary* 770 (2d ed. 1989) (defining "inadvertent" to mean "unintentional"); *Random House Webster's College Dictionary* 658 (2d ed. 1997) (same). Second, whatever one's particular theory of statutory interpretation, the aim, all presumably agree, is to discern and enforce Congress' intent. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). If, as the Seventh Circuit acknowledges, Congress had no "inten[tion]" in 1948 to make substantive changes to the Hobbs Act, then none should be attributed. And, finally, this Court has steadfastly refused to "infer[] that the legislature, in revising and consolidating the laws" – as it did with the Hobbs Act in 1948 – "intended to change their policy, unless such intention *be clearly expressed*," which all acknowledge it was not here. *United States v. Ryder*, 110 U.S. 729, 740 (1884).

III. The "Three-Way" Interpretation Cannot Be Reconciled With the Structure of the Federal Criminal Code.

In addition to textual and historical problems, there are also at least two structural defects inherent in the three-way reading. First, an interpretation of the Hobbs Act that makes any act or threat of "physical violence" – standing alone – a federal offense has the effect of rendering essentially superfluous a whole host of other, more specific, federal criminal statutes. Perhaps the clearest example is the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. §248, which, as Justice Stevens observed in *Scheidler II*, responds directly "to the concerns that gave rise to these cases." 537 U.S. at 417 (Stevens, J., dissenting). Specifically, as relevant here, the so-called FACE Act targets anyone who "intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services." 18 U.S.C. §248(a)(3). Notably, though, the FACE Act prescribes relatively modest criminal penalties for violations: one year for a first offense and three years for subsequent offenses. *Id.* §248(b). By bluntly

punishing essentially all "physical violence" (whether against persons or property) with 20 years in prison, the three-way interpretation of the Hobbs Act supplants the congressional compromise that the FACE Act presumably embodies.[5]

And the FACE Act is only the most obvious casualty of the Seventh Circuit's overbroad reading. A host of federal criminal statutes would be effectively swallowed up by the three-way interpretation. Among them –

- 18 U.S.C. §32(a)-(b) (destruction of airplane);
- 18 U.S.C. §33(a) (destruction of motor vehicle);
- 18 U.S.C. §111(a) (assaulting a federal officer);
- 18 U.S.C. §844(i) (arson);
- 18 U.S.C. §1201(a) (kidnapping);
- 18 U.S.C. §1203(a) (hostage-taking);
- 18 U.S.C. §2119 (carjacking);
- 18 U.S.C. §2242 (sexual abuse); and
- 18 U.S.C. §2261(a) (domestic violence).

Some overlap among federal statutes is to be expected, of course. *Compare* 18 U.S.C. §1201(a) (kidnapping) *with* 18 U.S.C. §351 (kidnapping federal officer). But by broadly criminalizing "physical violence," the three-way reading of the Hobbs Act would consign a large chunk of the federal

[5] Notably, during consideration of the FACE Act, Attorney General Janet Reno testified that the Act was necessary, in part, because "existing federal laws, while perhaps applicable in some instances, [are] inadequate." *Hearing Before the Senate Comm. on Labor and Human Resources*, 103rd Cong. 1st Sess. 8 (May 12, 1993). Under the three-way interpretation of the Hobbs Act, of course, her testimony would not have been entirely accurate, 20 years in the pokey presumably being a more-than-"[]adequate" deterrent to clinic violence.

criminal code to the dustbin. This Court should reject a statutory construction that seems so obviously to "make nonsense out of the *corpus juris*." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100-01 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." (quoting 2 J. Sutherland, *Statutory Construction* §5201 (3d ed. 1943)).

There is a second structural problem worth noting. The three-way interpretation would have the effect of expanding RICO's scope beyond all recognizable – and intended – boundaries. RICO, of course, includes violations of the Hobbs Act among its list of predicate crimes. 18 U.S.C. §1961(1). By contrast, RICO conspicuously does *not* include as a predicate crime any of the physical-violence-based offenses listed above. Thus, for whatever reason, Congress chose not to make assault, for instance, a RICO predicate offense. But under the three-way reading, a prosecutor or plaintiff could paper over that evident gap simply by dressing up an assault-charge in Hobbs Act garb. No statute – and particularly not RICO – should be construed to be so manipulable.

One final RICO-related point: In its original incarnation, the bill that would become RICO defined "racketeering activity" sweepingly to cover "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." S. 1861, 91st Cong. §2(a) (1969). After the ACLU and Justice Department (among others) objected to the statute's breadth, the original "danger of violence to life, limb or property" formulation was scrapped in favor of the current delineation of specific offenses. *See* Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 697-99 (1999). By recognizing any act or threat of "physical violence" as a stand-alone Hobbs Act violation

qualifying for predicate-act status, the three-way interpretation effectively reinstates the overbroad version of RICO that Congress expressly rejected.

IV. The "Three-Way" Interpretation Cannot Be Reconciled With Fundamental Principles of Federalism.

Finally, in addition to text, legislative history, and statutory structure, there is the issue of federalism. The Seventh Circuit's sweeping reading of the Hobbs Act contravenes the most basic tenets of Our Federalism. The court of appeals flagged the federalism issue, but dismissed it casually by pointing to the presence in the Hobbs Act of "a jurisdictional element that limits its application to anyone who 'obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.'" Pet. App. 12a (quoting 18 U.S.C. §1951(a)). That jurisdictional hook, the Seventh Circuit said, alleviated any difficulty with the three-way interpretation "under the Supreme Court's Commerce Clause jurisprudence." *Id.*

There are two problems. First, by focusing exclusively on the Commerce Clause question (of which more below, *see infra* at 17-19), the Seventh Circuit overlooked a more immediate problem: Whether or not it is actually unconstitutional, the three-way interpretation of the Hobbs Act has the untoward effect of *federalizing essentially all violent crime*. Under that reading, anyone who "commits or threatens" any physical violence to "any person or property," and in so doing "in any way or degree" so much as "affects" commerce, is guilty of a federal offense punishable by 20 years. That construction runs headlong into this Court's precedent, as well as common sense.

This Court has recently reiterated that "[u]nder our federal system, the '"States possess primary authority for defining and enforcing the criminal law,"'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982))), and, further, that "criminal law

enforcement" is an area "where States historically have been sovereign," *id.* at 564; *see also id.* at 580 (Kennedy, J., concurring) (criminal law an "area of traditional state concern"). It has long been recognized, by contrast, that Congress has no power to "punish felonies generally," *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821), and does not enjoy anything approaching a general police power over citizens' health and safety, *see United States v. Morrison*, 529 U.S. 598, 618-19 & n.8 (2000).

Relatedly, and more recently still, this Court has reiterated that "[w]hen 'Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))). This clear-statement rule applies, the Court has explained, "when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in '"traditionally sensitive areas'" that '"affec[t] the federal balance."'" *Id.* at 543-44 (quoting *Will*, 491 U.S. at 65 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))). "In such cases, the clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Id.* at 544 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464 (1991)).

In view of the presumption that the criminal law is the States' domain, there is "good reason" here – as in *Atascadero*, *Will*, *Gregory*, and *Raygor* – "to rely on a clear statement principle of statutory construction." *Id.* at 543. And whatever might be said (elsewhere) in its favor, the three-way interpretation of the Hobbs Act is *not* "clear" on the face of the statute. Indeed, the Seventh Circuit itself admitted as much by observing that there are (in its view) "two possible interpretations of [the Hobbs Act's] language"

and that §1951(a)'s text "can be read either way without undue strain." Pet. App. 8a. We, of course, happen to believe that the only permissible reading of the Hobbs Act forecloses the three-way interpretation. *See supra* at 6-8. But to the extent that any ambiguity exists, this Court's cases require that it be resolved against federalization and in favor of the traditional federal-state balance.

It is worth pausing briefly to consider the real-world implications of the three-way interpretation. Untethered from the traditional anchors of robbery and extortion, Hobbs Act liability would know no end. Couldn't almost any act or threat of physical violence – whether against a person or property – be said to "affect" commerce in some way, shape, form, or fashion? Assaulting a salesman, certainly; slashing another person's tires, probably. Shoplifters, pickpockets, and other petty thieves – all would presumably be guilty of *federal* offenses (indeed, felonies) under the three-way reading. How the federal courts could be expected to handle the ensuing crush of litigation is anyone's guess.[6]

Nor, somewhat closer to home, is there anything to suggest an exemption to the freewheeling three-way construction for state and local government officials. Construed as the Seventh Circuit seemingly would allow, the Hobbs Act would sweep in a whole host of otherwise legitimate (and purely local) activities undertaken by States

[6] The over-federalization of the criminal law (and the resulting strain on federal-court resources) has been a consistent theme of the Chief Justice's annual reports on the state of the federal judiciary. *See, e.g.*, William H. Rehnquist, The 1998 Year-End Report of the Federal Judiciary, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1999, at 2; William H. Rehnquist, 1993 Year-End Report on the Federal Judiciary, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1994, at 1, 3; William H. Rehnquist, 1991 Year-End Report on the Federal Judiciary, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1992, at 1, 3. The American Bar Association has also noted the problem. *See generally* ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* (1998).

and state officers. Police officers, for instance, regularly and necessarily engage in conduct – say, in tackling a fleeing suspect – that might be deemed an act or threat of physical violence; do all such acts that somehow "affect" commerce thereby give rise to federal Hobbs Act liability? Likewise, cities and States routinely condemn property and raze buildings, and thereby "commit ... physical violence" against "property"; are those acts, too, all Hobbs Act violations?[7] Jurisprudential concerns aside, the practical consequences of the Seventh Circuit's three-way interpretation are enough to condemn it.

There is a second, separate problem with the Seventh Circuit's treatment of the federalism issue. Despite the court of appeals' offhand dismissal (Pet. App. 12a), the three-way interpretation of the Hobbs Act does, in fact, present serious Commerce Clause questions. If, as under the traditional two-way interpretation, an act or threat of physical violence must be tied to a robbery or extortion, the Hobbs Act is presumably a valid exercise of Congress' Commerce Clause power – the reason being that robbery and extortion are both "economic" activities within the meaning of this Court's decisions in *Lopez* and *Morrison*. As emphasized in *Morrison*, in every case in which this Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611 (citing *Lopez*, 514 U.S. 559-60). As applied to robbery and extortion – both of which, by definition, involve

[7] The same, apparently, goes for federal officials. *See United States v. Stephenson*, 895 F.2d 867, 871-73 (2d Cir. 1990) (Hobbs Act applies to federal officials); U.S. Dep't of Justice, *Criminal Resource Manual* §2404 (Hobbs Act applies to a "wide range of officials, including those serving on the federal ... level[]"), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9crm02404.htm. It is hard to imagine that Congress actually intended to make a federal felony out of every act or threat of physical violence undertaken by a federal official.

the taking of valuable private property – there is every reason to believe that the Hobbs Act is constitutional.

But that same presumption would not apply were the Hobbs Act read to apply to any act or threat of physical violence – even those *not* tied in any way to robbery, extortion, or any other "economic endeavor." Just as neither gun possession, *see Lopez*, 514 U.S. at 567, nor domestic battery, *see Morrison*, 529 U.S. at 613, is in any sense an economic activity, an act or threat of "physical violence to any person or property," 18 U.S.C. §1951(a), is not in and of itself economic. Under the three-way interpretation, therefore, the Hobbs Act would likely fall victim to the principle that undergirds both *Lopez* and *Morrison* – that the Court has "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617.

The Seventh Circuit's assumption that all Commerce Clause problems melt away by virtue of "a jurisdictional element that limits [the Hobbs Act's] application to anyone who 'obstructs, delays, or affects commerce or the movement of any article or commodity in commerce'" (Pet. App. 12a) rests on an oversimplification. To be sure, a jurisdictional hook is relevant to determining a statute's constitutionality under the Commerce Clause, but it is not alone conclusive. At most, this Court has said that a jurisdictional element "*may* establish," or "lend support to the argument," that a statute is within Congress' Commerce Clause power. *Morrison*, 529 U.S. at 612-13 (emphasis added). But to serve the proper narrowing function, a jurisdictional hook must actually "ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce." *Lopez*, 514 U.S. at 561. And not every jurisdictional element will fit that bill. *See, e.g., United States v. Maxwell*, 386 F.3d 1042, 1062 (11th Cir. 2004) ("Congress cannot guarantee the proper use of its authority by creating jurisdictional hooks that relate to interstate commerce in some way but fail in all cases to confine the scope of its regulation to Constitutional boundaries."), *petition for cert. filed*, 73 U.S.L.W. 3632 (U.S. Apr. 14, 2005) (No. 04-1382); *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000) (same); *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (same). In the end, whether a statute includes a formal jurisdictional element or not, the test remains whether, as a substantive matter, Congress has observed "the distinction between what is national and what is local." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). As one court put the matter, if "uttering pretextual incantations evoking the phantasm of commerce" alone were sufficient, "Congress could federalize the crime of murder by inserting a statutory element that requires the prosecution to prove that the defendant ate a cheeseburger that traveled in interstate commerce." *Maxwell*, 386 F.3d at 1062.

To be sure, the Seventh Circuit's three-way reading of the Hobbs Act may not correlate precisely to the hypothetical "murder-with-cheeseburger" law. But the basic point remains: The three-way interpretation effectively federalizes all violent crime, and the rote insertion of a boilerplate "in any way ... affects commerce" clause does nothing to justify Congress' intrusion into an area of traditional state concern. At the very least, under the principle that statutes should be construed to avoid constitutional problems, the Hobbs Act should be read, as the Sixth and Ninth Circuits have read it, to require a connection between an alleged act or threat of violence and an (economic) act of robbery or extortion. *See, e.g., Clark v. Martinez*, 125 S. Ct. 716, 724-25 (2005) (describing avoidance canon); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Far from

avoiding constitutional doubt, the Seventh Circuit's overbroad interpretation actually invites it.[8]

* * *

The Seventh Circuit's "three-way" reading of the Hobbs Act is irreconcilable with the Act's plain language and legislative history, the overarching structure of the federal criminal code, and fundamental principles of federalism. It should be rejected.

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[8] Reading the Hobbs Act to make federal crimes of all acts of "physical violence," whether connected to robbery or extortion or not, would also raise significant questions under the principles of federalism embodied in the "[l]ong ignored" Domestic Violence Clause of Article IV. Jay Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 Geo. Wash. L. Rev. 1, 3-4 (1997). That Clause provides that "[t]he United States ... shall protect [every State in this Union] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. art. IV, §4. As now-Judge Bybee's thorough historical treatment amply demonstrates, the term "domestic Violence" in the Clause was originally understood, and has since traditionally been understood, as applying not just to violence in the open-rebellion sense but also to violence of the more ordinary sort. *See id.* at 34-39. And further - and this is the point - by requiring that the Federal Government await a State's formal "Application" before intervening, the Clause serves as a "reaffirmation of the enumerated powers doctrine and a promise of federal nonintervention that prohibits not only the uninvited use of federal forces to combat crime, but also forbids federal legislation that displaces the states' obligation to protect their citizens by suppressing domestic violence." *Id.* at 4.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' judgment.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

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